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Special Litigation Counsel for
Kavita Gupta, Chapter 7 Trustee

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re:

GABRIEL TECHNOLOGIES
CORPORATION *et al.*,

Debtors.

E.I.N. 22-3062052; 20-1711149

Case No. 13-30340-DM

(Jointly Administered with Case No. 13-30341)

Chapter 7 Proceedings

**NOTICE OF HEARING ON CHAPTER 7
TRUSTEE'S MOTION FOR GOOD FAITH
SETTLEMENT DETERMINATION REGARDING
THE SETTLEMENT BETWEEN KAVITA
GUPTA, AS CHAPTER 7 TRUSTEE FOR
CONSOLIDATED ESTATES, AND HUGHES
HUBBARD & REED LLP**

[Filed concurrently with Motion for Good Faith Determination, the Memorandum of Points and Authorities and Declarations in Support Thereof. Also filed concurrently herewith are the Notice of Motion, Motion for Order Approving Settlement Pursuant to Fed. R. Bankr. P. 9019, and supporting Memorandum of Points and Authorities, and Declarations and Request for Judicial Notice in Support Thereof]

Hearing:

Date: September 16, 2016

Time: 10:00 a.m.

Place: Courtroom 17

United States Bankruptcy Court
450 Golden Gate Avenue, 16th Floor
San Francisco, California 94102

1 **TO THE HONORABLE DENNIS MONTALI, UNITED STATES BANKRUPTCY COURT**
2 **JUDGE, THE OFFICE OF THE UNITED STATES TRUSTEE, AND ALL PARTIES IN**
3 **INTEREST:**

4 **PLEASE TAKE NOTICE** that on September 16, 2016 at 10:00 a.m. in Courtroom 17 of
5 the United States Bankruptcy Court located at 450 Golden Gate Avenue, 16th Floor, San Francisco,
6 California 94102, Kavita Gupta, the chapter 7 trustee (the “Trustee”) for the bankruptcy estates of
7 Debtor Gabriel Technologies Corporation, Bankruptcy Case No. 13-30340, and Debtor Trace
8 Technologies, LLC, Bankruptcy Case No. 13-30341 (collectively, the “Estates”), will and hereby
9 does move for the entry of an order finding that the settlement (the “Settlement”) by and between
10 the Trustee and Hughes Hubbard & Reed LLP (“Hughes Hubbard”) was made and entered into in
11 good faith pursuant to California Code of Civil Procedure § 877.6 (the “Good Faith Settlement
12 Motion”). The Settlement resolves any and all claims that the Trustee asserts the Estates have or
13 may have against the Debtors’ former counsel, Hughes Hubbard, including certain present and
14 former lawyers at Hughes Hubbard and others related to Hughes Hubbard, in connection with and
15 arising out of (a) its representation of the Debtors in the action entitled *In re Gabriel Technologies*
16 *Corporation and Trace Technologies, LLC v. Qualcomm Incorporated, Snaptrack, Inc. and*
17 *Norman Krasner*, Case No. 08-CV-1992, which was pending in the United States District Court for
18 the Southern District of California, and the appeal thereof entitled, *Gabriel Technologies*
19 *Corporation and Trace Technologies, LLC v. Qualcomm Incorporated, Snaptrack, Inc. and*
20 *Norman Krasner*, Case No. 13-1205, which was pending in the United States Court of Appeals for
21 the Federal Circuit (the “Action”), and (b) their alleged efforts and opinions provided to secure
22 funds from any Person or entity to pay the fees, expenses and costs of the Action.

23 **PLEASE TAKE FURTHER NOTICE THAT ANY PARTY INTERESTED IN**
24 **RECEIVING A COPY OF THE GOOD FAITH SETTLEMENT MOTION AND ANY**
25 **SUPPORTING PLEADINGS AND DOCUMENTATION MAY CONTACT SPECIAL**
26 **LITIGATION COUNSEL FOR THE TRUSTEE, WHOSE NAME AND CONTACT**
27 **INFORMATION APPEARS ON THE FRONT, TOP LEFT CORNER OF THIS NOTICE,**
28 **AND WHO WILL PROVIDE SUCH COPIES UPON REQUEST.**

1 **PLEASE TAKE FURTHER NOTICE** the Settlement with Hughes Hubbard is conditional
2 upon: (1) the Court entering a final order approving the *Chapter 7 Trustee's Motion for Approval of*
3 *Settlement with Hughes Hubbard & Reed LLP* pursuant to Federal Rule of Bankruptcy Procedure
4 9019 (the "9019 Motion"), that is being filed concurrently herewith; and (2) the Court entering a
5 final order approving the Good Faith Settlement Motion.

6 **PLEASE TAKE FURTHER NOTICE** that the Settlement is memorialized in a
7 Settlement Agreement, a true and correct copy of which is attached as Exhibit 1 to the Declaration
8 of Kavita Gupta (the "Gupta Declaration") filed concurrently herewith, the terms of which are
9 incorporated herein by reference (the "Settlement Agreement"). A true and correct copy of the
10 Trustee's *Memorandum of Points and Authorities* in support of the 9019 Motion is attached as
11 Exhibit 2 to the Gupta Declaration in support of the Good Faith Settlement Motion, filed
12 concurrently herewith.

13 **PLEASE TAKE FURTHER NOTICE THAT** California Code of Civil Procedure
14 § 877.6 provides:

15 (a)(1) Any party to an action in which it is alleged that two or more parties are joint
16 tortfeasors or co-obligors on a contract debt shall be entitled to a hearing on the issue of the good
17 faith of a settlement entered into by the plaintiff or other claimant and one or more alleged
18 tortfeasors or co-obligors, upon giving notice in the manner provided in subdivision (b) of Section
19 1005. Upon a showing of good cause, the court may shorten the time for giving the required notice
20 to permit the determination of the issue to be made before the commencement of the trial of the
21 action, or before the verdict or judgment if settlement is made after the trial has commenced.

22 (2) In the alternative, a settling party may give notice of settlement to all parties and to the
23 court, together with an application for determination of good faith settlement and a
24 proposed order. The application shall indicate the settling parties, and the basis, terms, and
25 amount of the settlement. The notice, application, and proposed order shall be given by
26 certified mail, return receipt requested. Proof of service shall be filed with the court. Within
27 25 days of the mailing of the notice, application, and proposed order, or within 20 days of
28 personal service, a nonsettling party may file a notice of motion to contest the good faith of
the settlement. If none of the nonsettling parties files a motion within 25 days of mailing of
the notice, application, and proposed order, or within 20 days of personal service, the court
may approve the settlement. The notice by a nonsettling party shall be given in the manner
provided in subdivision (b) of Section 1005. However, this paragraph shall not apply to
settlements in which a confidentiality agreement has been entered into regarding the case or
the terms of the settlement.

1 (b) The issue of the good faith of a settlement may be determined by the court on the basis
2 of affidavits served with the notice of hearing, and any counteraffidavits filed in response, or the
3 court may, in its discretion, receive other evidence at the hearing.

4 (c) A determination by the court that the settlement was made in good faith shall bar any
5 other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-
6 obligor for equitable comparative contribution, or partial or comparative indemnity, based on
7 comparative negligence or comparative fault.

8 (d) The party asserting the lack of good faith shall have the burden of proof on that issue.

9 (e) When a determination of the good faith or lack of good faith of a settlement is made,
10 any party aggrieved by the determination may petition the proper court to review the determination
11 by writ of mandate. The petition for writ of mandate shall be filed within 20 days after service of
12 written notice of the determination, or within any additional time not exceeding 20 days as the trial
13 court may allow.

14 (1) The court shall, within 30 days of the receipt of all materials to be filed by the parties,
15 determine whether or not the court will hear the writ and notify the parties of its
16 determination.

17 (2) If the court grants a hearing on the writ, the hearing shall be given special precedence
18 over all other civil matters on the calendar of the court except those matters to which equal
19 or greater precedence on the calendar is granted by law.

20 (3) The running of any period of time after which an action would be subject to dismissal pursuant
21 to the applicable provisions of Chapter 1.5 (commencing with Section 583.110) of Title 8 of Part 2
22 shall be tolled during the period of review of a determination pursuant to this subdivision.

23 **PLEASE TAKE FURTHER NOTICE THAT** as set forth in full the concurrently filed
24 Gupta Declaration and declaration of Larry W. Gabriel (“Gabriel Declaration”), and the Good Faith
25 Settlement Motion, the Settlement represents the product of an extensive evaluation of the Estates’
26 claims and potential claims against Hughes Hubbard and the other attorneys who represented the
27 Debtors in the Action, and has concluded,¹ as follows:

28 The relevant factors used by courts in making a good faith settlement
determination include (1) whether the settlement amount reasonably relates to
the settlor’s proportionate share of liability (the “ball park” test), (2) the total
settlement amount, (3) the idea that a settling defendant should generally pay
less than one found liable at trial, (4) the financial conditions and insurance
policy limits of settling defendants, and (5) whether the settling parties
colluded to hurt the non-settling defendants’ interests. *See Tech-Bilt, Inc. v*

¹ Memorandum of Points and Authorities in Support of Chapter 7 Trustee’s Motion for Good Faith Settlement
Determination Regarding the Settlement Between Kavita Gupta, as Chapter 7 Trustee for Consolidated Estates, and
Hughes Hubbard & Reed LLP, pp. 10-15.

Woodward-Clyde & Associates, 38 Cal.3d 488 (1985)(“Tech-Bilt”) at 499-500.

1. The Settlement Amount Reasonably Relates To Hughes Hubbard’s Proportionate Share of Liability, and It Is Appropriate that Hughes Hubbard Pay Less Than If the Case Was Fully Litigated

The Settlement Agreement represents the product of an extensive evaluation of the Trustee’s claims and potential claims against Hughes Hubbard and the other attorneys who represented the Debtors in the Action (WHGC² and Fitzgerald³). (Gupta Declaration, ¶ 15.) The Trustee considered her claims and potential issues of relative liability as to each of Hughes Hubbard, WHGC (local counsel) and Fitzgerald (counsel regarding the Fee Motion and appeal). *Id.* The Trustee believes that it is probable that she would prevail if she pursued litigation against Hughes Hubbard. *Id.* The claims themselves present fairly straight-forward issues as to Hughes Hubbard’s advice as to the propriety of continuing litigation after the Bond Order was issued by the District Court. *Id.* However, the Trustee recognizes that, as with all litigation, the outcome is ultimately uncertain and ultimately rests with the trier of fact. *Id.* The claims would likely require expert testimony, likely with two or three experts providing testimony on the issue of patent law, legal malpractice and billing practices. (Gabriel Declaration, ¶ 7.) In addition, it is possible that the claims would have to be arbitrated given the terms of the Hughes Hubbard’s retention agreement with the Debtors. That agreement requires that the arbitration take place in New York, with New York law being applied to the claims presented. (Gupta Declaration, ¶ 19; Gabriel Declaration, ¶ 7.) Such an arbitration may result in increasing the expense for the prosecution of the claims, require the need to retain local counsel, and subject the claims to the vagaries of New York law. *Id.*

Moreover, even if the Trustee prevailed in litigation against Hughes Hubbard, the amount of recovery is subject to dispute. (Gupta Declaration, ¶ 15; Gabriel Declaration, ¶ 8.) The Trustee has also analyzed the damage claim that could be pursued *vis a vis* the Hughes Hubbard claims. (Gupta Declaration, ¶ 16.) It is the Trustee’s view that the approximate range of the Estates’ potential damages against Hughes Hubbard is between \$13 million - \$20 million. (Gupta Declaration, ¶ 16; Gabriel Declaration, ¶ 8.) That amount includes the \$13 million Fee Order, interest on the Fee Order from the date it was entered, attorney fees, and the additional debt (now claims) the Debtors would not have otherwise incurred but for the continuation of the Action. *Id.* Hughes Hubbard has asserted numerous defenses to the claims. (Gabriel Declaration, ¶ 9.) For example, it will likely contend that the Fee Order erroneously included approximately \$5 million in fees that were incurred prior to the Bond Order and that Fitzgerald, not Hughes Hubbard, is liable for failing to recognize and challenge this error. *Id.* Hughes Hubbard may also contend that the Debtors’ board of directors was fully advised of the risk of litigation and that the Debtors would have likely continued with the Action because they had no profitable business operations. *Id.* Taking litigation risk and the time value of money into consideration, the Trustee believes that the settlement of \$7.25 million represents a reasonable and fair compromise that is between 36% - 56% of the Estates’ total potential claim against Hughes Hubbard. (Gupta Declaration, ¶ 16.) The Settlement takes

² WHGC, P.L.C., and Wang Hartman Gibbs & Cauley, P.L.C. (“WHGC”).

³ Fitzgerald Knaier LLP, f/k/a Chapin Fitzgerald Knaier LLP (“Fitzgerald”).

1 into account the probability of success in litigation, and the Trustee believes
2 that it is in the best interests of the Estates and their creditors. (Gupta
3 Declaration, ¶¶ 16, 19.) The Trustee does not believe that it is prudent to
4 subject the Estates to the risks and costs associated with litigating the claims
5 against Hughes Hubbard given the settlement amount of \$7.25 million should
6 provide a substantial benefit to the creditors of the administratively insolvent
7 estates. (Gupta Declaration, ¶ 16.) The Trustee believes, in her business
8 judgment, that the proposed Settlement is more beneficial to the Estates than
9 the litigation of the claims against Hughes Hubbard. *Id.*

10 The litigation against Hughes Hubbard would present fairly complex legal
11 issues and hurdles. (Gupta Declaration, ¶ 19; Gabriel Declaration, ¶¶ 7-11.)
12 As has been made clear by Hughes Hubbard's counsel, the issues would be
13 heavily litigated. (Gabriel Declaration, ¶ 10.) First, the Trustee will have to
14 address a number of jurisdictional and choice of laws issues in regard to
15 whether the claims would need to be arbitrated, and if so, where the
16 arbitration would take place. (Gupta Declaration, ¶ 19; Gabriel Declaration, ¶
17 10.) The retention agreement with Hughes Hubbard provides that any claim
18 against the firm be arbitrated in New York, and that New York law applies.
19 (Gupta Declaration, ¶ 19.) The Trustee believes that the Bankruptcy Court
20 should adjudicate the claims against Hughes Hubbard, but it is possible that
21 Hughes Hubbard would prevail in its argument that the claims should be
22 arbitrated in New York. *Id.* Arbitration is often time-consuming and
23 extremely costly. (Gupta Declaration, ¶ 19; Gabriel Declaration, ¶ 10.) To
24 the extent that the arbitration was to take place in New York, and if New York
25 law was applied, the Trustee and her counsel would likely incur significant
26 travel expenses, and may also need to retain local counsel in New York to
27 advise as to New York law. (Gupta Declaration, ¶ 19; Gabriel Declaration, ¶
28 7.)

1 The Trustee has claims against Fitzgerald as heretofore expressed. (Gupta
2 Declaration, ¶¶ 12, 17, 21). Fitzgerald's retainer agreement with the Debtors
3 requires an arbitration of the claims against it to be held in San Diego County.
4 (Gupta Declaration, ¶ 12). Motions, and potentially time-consuming appeals,
5 could take place over whether the claims are to be arbitrated, whether the
6 claims against Hughes Hubbard and the other firms must be jointly arbitrated,
7 where the arbitration would take place, and what state's law would be applied.
8 (Gabriel Declaration, ¶ 10.)

9 Moreover, it is possible Hughes Hubbard would seek to have a "trial within a
10 trial" in order to prove causation. (Gabriel Declaration, ¶ 11.) Although the
11 Trustee does not believe that a "trial within a trial" approach would apply, if it
12 did, such an approach would be time-consuming, would likely involve two or
13 more expert witnesses on each side, and would be costly. *Id.* The expert
14 witness costs would likely exceed several hundred thousand dollars, at a
15 minimum, and could ultimately reach close to \$1 million depending on the
16 number of expert witnesses needed. *Id.* Even though the Trustee's counsel is
17 retained on a contingency fee basis, fees and costs for arbitration, expert
18 witnesses and other costs could be substantial if the Trustee were to litigate
19 the claims against Hughes Hubbard. *Id.* In addition, while the Trustee is
20 confident in her analysis of the claims and the likelihood of success on the
21 merits, there is never any certainty to such claims, and the amount of the
22 settlement is reasonable given the risks of litigation, and the years the
23 litigation could take to conclude. (Gupta Declaration, ¶ 16.)

1 The complexity of the litigation, expense, and potential delay due to issues
2 regarding arbitration, all weigh in favor of resolving the claims against
3 Hughes Hubbard to avoid significant cost, delay and risk. (Gupta Declaration,
4 ¶ 19.) However, the amount of the settlement still must be fair and reasonable
5 given the probability of success at trial. *Id.* As discussed above, the Trustee
6 believes that the Settlement Amount appropriately takes into account the
7 range of potential outcomes for the claims taking into account the probability
8 of success at trial. *Id.*

9 As set forth in the WHGC Motion for Approval of Settlement, filed
10 concurrently herewith, the settlement amount to be paid by WHGC is
11 substantially less than the amount to be paid by Hughes Hubbard because
12 WHGC acted as local counsel for the Debtors in the Action. (Gupta
13 Declaration, ¶ 17.) While WHGC is responsible for its actions, and the advice
14 and counsel provided to the Debtors, the Trustee considered that WHGC, as
15 local counsel, presumably followed the instructions of Hughes Hubbard. *Id.*
16 Therefore, based on WHGC's likely limited autonomy to provide advice
17 separate from that of Hughes Hubbard, the amount to be paid by WHGC is far
18 less than the amount to be paid by Hughes Hubbard. *Id.* The Trustee's claims
19 against Fitzgerald (counsel in relation to the Fee Motion and appeal) are
20 estimated to be in excess of \$5 million. *Id.* Given the total amount of the Fee
21 Order of approximately \$13 million, the share to be paid by Hughes Hubbard
22 in the Settlement (\$7.25 million) reasonably relates to its proportionate
23 liability and satisfies the "ball park" test in *Tech-Bilt*. Because it is also
24 appropriate pursuant to *Tech-Bilt* that Hughes Hubbard pay less than it would
25 be required to pay if the Trustee were to prevail on her claims at trial, the
26 Settlement Amount of \$7.25 million is less than the approximate range of
27 potential damages of \$13 million to \$20 million. (Gupta Declaration, ¶¶ 15-
28 17; Gabriel Declaration, ¶¶ 7-12.)

2. The Financial Conditions And Insurance Policy Limits Of Settling Defendants

17 This is not a factor given that the Trustee believes that if she obtained a
18 judgment against Hughes Hubbard, she would be able to collect in full on the
19 judgment. (Gupta Declaration ¶ 18.)

3. The Settlement Was Reached After Mediation with Hughes Hubbard, WHGC and Fitzgerald, Which Also Provided Fitzgerald An Adequate Opportunity To Resolve The Trustee's Claims. There Was No Collusion Vis A Vis The Settlement Obtained

21 The mediation with Judge Infante included the Trustee, Hughes Hubbard,
22 WHGC and Fitzgerald. (Gupta Declaration, ¶¶ 11, 20.) The Settlement was
23 reached after the mediation with Judge Infante and after the Trustee and her
24 lawyers evaluated the evidence and merits of the case. The Settlement was
25 achieved by the Trustee and Hughes Hubbard's acceptance of a "mediator's
26 proposal" for settlement of the claims. *Id.* WHGC and the Trustee also
27 resolved the Trustee's claims at the mediation, as set forth in the WHGC
28 Motion for Approval of Settlement. *Id.* Fitzgerald and its counsel were
present at the mediation but Fitzgerald chose not to resolve the Trustee's
claims. *Id.* Therefore, the Trustee is currently litigating her claims against
Fitzgerald. (Gupta Declaration, ¶ 12.) In other words, the Debtors' counsel in
the Action (Hughes Hubbard, WHGC and Fitzgerald) all had a fair
opportunity to resolve their claims with the Trustee at the mediation, and
while Hughes Hubbard and WHGC agreed to resolve the Trustee's claims,

Fitzgerald chose to not resolve those claims. Given the global mediation, the reputation of Judge Infante, and the ability of each of the former attorneys for the Debtors in the Action to resolve the claims through the mediation process, there was no collusiveness as between the Trustee and Hughes Hubbard. Moreover, as previously noted, the Settlement Amount was presented in the form of a mediator's proposal. (Gupta Declaration, ¶¶ 11, 20.) Under such circumstances there can be no inference drawn that somehow the parties colluded to deprive Fitzgerald any rights of contribution or indemnity. (Gupta Declaration, ¶¶ 9, 11, 12, 20.)

4. Paramount Interests of Creditors

Although not a factor for good faith determination, the Settlement Amount of \$7.25 million is significant and will likely provide a substantial benefit to the Estates and creditors without the significant risks and costs of litigation. Given that the Estates are currently administratively insolvent, the Settlement should provide for meaningful recovery for creditors of the Estates. (Gupta Declaration, ¶ 21.)

PLEASE TAKE FURTHER NOTICE THAT given, among other things, the settlement amount in the Settlement Agreement, the claims to be resolved, the cost of litigation saved by the Estates, and the Settlement having resulted from a mediation in which the Trustee, Hughes Hubbard and other prior counsel for the Debtors in the Action all participated, the Trustee believes that not only is the Settlement in the best interests of the Estates, and should result in providing significant funds to distribute to creditors, but that the Settlement satisfies the criteria for determining that the Settlement was made and entered into in "good faith" as set forth according to the *Tech-Bilt* factors, as set forth above and in full in the Good Faith Settlement Motion.

PLEASE TAKE FURTHER NOTICE that the Good Faith Settlement Motion is supported by this Notice, and the following documents filed concurrently herewith: (i) the Good Faith Settlement Motion, (ii) the Memorandum of Points and Authorities in support of the Good Faith Settlement Motion, (iii) the Gupta Declaration, (iv) the Gabriel Declaration, (v) the Request for Judicial Notice in Support of the Good Faith Settlement Motion filed concurrently herewith, the entire record before the Court, those matters of which this Court may take judicial notice, and such further evidence and argument that may be presented at or before the hearing on the Good Faith Settlement Motion.

PLEASE TAKE FURTHER NOTICE that pursuant to Bankruptcy Local Rule 9014-1(c)(1), any opposition to the Good Faith Settlement Motion shall be filed and served on Special Litigation Counsel for the Trustee at least 14 days prior to the hearing date. Any

1 replies must be filed and served at least 7 days before the scheduled hearing date on the Good
2 Faith Settlement Motion. Any objection or request for a hearing must be accompanied by
3 any declarations or memoranda of law any requesting party wishes to present in support of
4 its position. If there is no timely objection to the requested relief, the court may enter an
5 order granting the relief.

6 Dated: August 10, 2016

BRUTZKUS GUBNER

8 By: /s/ Larry W. Gabriele

9 Larry W. Gabriel
10 Special Litigation Counsel for Kavita Gupta,
11 Chapter 7 Trustee for the bankruptcy estates of
12 Gabriel Technologies Corporation and Trace
13 Technologies, LLC
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